(14)

No. 91-636

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

FORT GRATIOT SANITARY LANDFILL, INC.,
Petitioner,

-vs.-

MICHIGAN DEPARTMENT OF NATURAL RESOURCES, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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March 18, 1992

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REPLY BRIEF FOR PETITIONER FORT GRATIOT SANITARY LANDFILL, INC.

Petitioner, Fort Gratiot Sanitary Landfill, Inc.,[1] respectfully submits this reply brief pursuant to Rule 25.3 of the Rules of the Supreme Court of the United States.[2]

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[1] Petitioner's Statement required by Rule 29.1 appears at page ii of the Brief for Petitioner.

[2] Citations herein to the Brief for Petitioner appear as "Petitioner's Brief at ___. "Citations herein to the Brief for Respondent Michigan Department of Natural Resources and Director of the Department appear as "State Brief at ____." Citations herein to the St. Clair County Respondents' Brief on the Merits appear as "County Brief at ___." Citations herein to the Brief for the States of Alabama, Arizona, Delaware, Indiana, Kentucky, Oregon and Virginia appear herein as "Kentucky Brief at ___." Citations to the Brief of the States of Pennsylvania, Georgia, Idaho, Illinois, Montana, Nebraska, Nevada, North Dakota, Ohio, South Carolina, South Dakota, Tennessee, West Virginia and Wyoming appear herein as "Pennsylvania Brief at ___."

ARGUMENT

RESPONDENTS' NOVEL ARGUMENTS IN SUPPORT OF THE DECISION BELOW WOULD, IF ACCEPTED, EMASCULATE THE COMMERCE CLAUSE

In substantial part, the briefs of the Respondents appear to present a reiteration of the Respondents' arguments before the courts below and in their briefs in opposition to Petitioner's Petition for Writ of Certiorari -- i.e., that the Waste Importation Restrictions[3] do not impermissibly discriminate against interstate commerce, even though they do discriminate against out-of-state waste as compared to in-county waste, because their "primary motivation" is not

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[3] Sections 13a and 30(2) of the Michigan Solid Waste Management Act, Mich. Comp. Laws Ann. §§299.413a, 299.430(2)(1991 Supp.) are herein referred to as the "Waste Importation Restrictions."

economic protectionism[4] and because the Michigan Solid Waste Management Act,

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[4] Michigan seems to be under the misapprehension that a statute will be deemed to discriminate impermissibly against interstate commerce only if it is "primarily motivated" by economic protectionism. Michigan has thus ignored the teachings of this Court in Maine v. Taylor that:

> "Once a state law is shown to discriminate against interstate commerce "either on its face or in practical effect," the burden falls on the State to demonstrate both that the statute "serves a legitimate local purpose," and that this purpose could not be served as well by available nondiscriminatory means.

477 U.S. 131, 138 (1986) (citing Hughes v. Oklahoma, 441 U.S. 322, 336). By contrast, where a state statute is "primarily motivated" by economic protectionism, i.e., "when the state statute amounts to simple economic protectionism," then "a virtually per se rule of invalidity has applied." Wyoming v. Oklahoma, 60 U.S.L.W. 4119, 4124 (1992). Moreover, as this Court stated in Philadelphia v. New Jersey:

> Whatever New Jersey's ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently.

437 U.S. at 626-627.

> does not contain the type of absolute facial prohibition which this Court found to be unconstitutional in cases such as Philadelphia v. New Jersey, Hughes v. Oklahoma, and Wyoming v. Oklahoma.

State Brief at 81-82.[5]

Apparently recognizing, however, that the Court is likely to subject the Waste Importation Restrictions to the strict scrutiny test by reason of the fact that the Waste Importation

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[5] According to the State, the Michigan Solid Waste Management Act "is 'discriminatory' only in the very broadest sense that it takes an affirmative decision by a particular county to include out-of-county waste in its management plan . . . ." State Brief at 71. What Michigan chooses to ignore is the undisputed fact that at the time of the enactment of the Waste Importation Restrictions, and at all times thereafter, the St. Clair County Solid Waste Management Plan did not "affirmatively" authorize the importation of out-of-county waste, with the result that by its express terms the Michigan Solid Waste Management Act prohibited the importation into St. Clair County of solid waste generated out-of-county. In any case, it is clear that the "effect" of the Act is to impose an embargo upon the importation of out-of-county waste and out-of-state waste into St. Clair County.

Restrictions discriminate against out-of-state waste, Respondents now appear to assert three novel arguments in support of their claim that the decisions below should be affirmed. First, Respondents contend that "state and local governments are entitled to some control over [landfill] capacity because of its heavy environmental, social and political costs." State Brief at 25-26. Second, Respondents contend that Michigan, by reason of its extensive regulation of municipal solid waste disposal, has become a market participant and is, therefore, not subject to the strictures of the Commerce Clause. Finally, Respondent St. Clair County contends that City of Philadelphia v. New Jersey, 437 U.S. 617 (1978), should not apply to the "fundamental" governmental function of

waste disposal or should be overturned because it imposes too great a burden on the States.

A. Respondents' Contention that State and Local Governments are Entitled to Exclude Out-of-State Waste, Notwithstanding the Commerce Clause, Because of the Heavy Costs of Landfills Only Demonstrates That The Waste Importation Restrictions Are Economic Protectionist Measures.

In its Summary of Argument, the State seeks to justify the discriminatory exclusion of out-of-state waste on the ground that "the actual article of commerce being bought and sold here is landfill capacity and state and local governments are entitled to some control over that capacity because of its heavy environmental, social and political costs." State Brief at 25-26. In like manner, the State concludes its argument that the Waste Importation Restrictions

do not violate the Commerce Clause by stating that "Michigan has created disposal capacity and is entitled to give a preference to those who have incurred the burden." State Brief at 91.

This novel argument is indefensible, at least insofar as it relates to privately constructed and operated landfills, since it is merely a subterfuge for excluding unwanted articles of commerce from a sister state -- i.e., municipal solid waste -- in order to promote local interests. As the State acknowledges in its brief, "[l]andfills are no longer considered natural resources but are considered engineered or manufactured facilities capable of being sited without the need for unique geological considerations." State Brief at 21-22. Thus, it seems

clear that the "heavy environmental, social and political costs" relied upon by the State as justification for an embargo upon out-of-state waste is not attributable to the landfill itself (except where the landfill is publicly-owned), but rather to the municipal solid waste which is to be deposited in the landfill. Moreover, the Commerce Clause would be emasculated by adoption of the principle that the State is now articulating since such principle would justify granting a preference to the citizens of any governmental unit which permitted the creation of any engineered or manufactured private facility which processed or stored articles of commerce in a manner which had arguably burdensome effects on the local community, whether by reason of real or perceived smell,

appearance or pollution. For example, if the State's novel principle were adopted by this Court, a state could prohibit a local privately-owned cannery from processing fish caught by foreigners in order to limit the emission of arguably noxious odors.

Ironically, the State's attempts to justify the exclusion of unwanted municipal solid waste from out-of-state because of the "heavy costs" attendant thereto serve to confirm that the Waste Importation Restrictions constitute an impermissible "attempt by one State to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade." City of Philadelphia v. New Jersey, 437 U.S. at 628. For example, in its Summary of Argument, Michigan attempts to justify

the exclusion of out-of-state waste by stating:

> A free flow of waste into a county which has incurred the politically tough burden of dealing with at least its own waste problems is simply not fair nor tolerable. The free market flow of waste is the cause of any past and current waste crisis. "Free market flow" is synonymous with "let others solve my problem."

State Brief at 22-23. In like manner, the State asserts later in its brief that

> [a]n unregulated free market flow of waste into Michigan, or to any other state with statutes similar to Michigan's, would be disruptive of efforts to plan for the proper disposal of future waste due to incoming waste from sources not accounted for during the planning process.

State Brief at 49. Moreover, the State advises, the Waste Importation Restrictions are not designed to hoard landfill capacity; rather, "the issue is one of how much of a burden the state or local unit of government must reasonably

undertake." State Brief at 56-57.[6] Finally, in claiming that there is no reasonable nondiscriminatory alternative to the exclusion of out-of-state waste, "Respondents submit that St. Clair County is entitled to some control over how much of an obligation it must incur due to the burdens referred to earlier." State Brief at 89.

Presumably, by citing the "burdens referred to earlier," the State intended to refer to the "politically tough burden of dealing with at least its own waste problems" and, perhaps, the "heavy environmental, social and political costs" attendant to the creation of

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[6] In like manner, the Kentucky Brief states that "[t]he real question should be whether a private operator can force the existence of a limitless trash market against a state's will, when the state wishes to have the operator assist it on a more limited scale in carrying out a government obligation." Kentucky Brief at 35-36.

landfill capacity. State Brief at 23, 26. However, as Respondent St. Clair County has candidly acknowledged, "[l]andfills are not natural resources. They can be located virtually anywhere, it is just a matter of cost of engineering a landfill." County Brief at 38; accord, State Brief at 21-22 ("[l]andfills are no longer considered natural resources but are considered engineered or manufactured facilities capable of being sited without the need for unique geological considerations"). Consequently, it is clear that the Waste Importation Restrictions were designed to enable the State and its counties to avoid the costs of engineering new landfills[7] by restricting the free flow

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[7] The County seems to suggest that the exclusion of out-of-state waste is not intended to (continued...)

of out-of-state waste into privately-constructed and privately-operated landfills and by reserving such private landfills for the exclusive use of local residents and businesses, who are also thereby protected from competition from the citizens and businesses of sister States. This, of course, is the essence of economic protectionism.[8]

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[7](...continued)
enable the State or its subdivisions to avoid the costs of creating new landfills, but rather is intended to avoid the "socialization" of solid waste landfills. County Brief at 6, 24 and 43. Even if one were to accept this novel idea, it could not be said that the discrimination against out-of-state waste was thereby "demonstrably justified by a valid factor unrelated to economic protectionism" as would be nonetheless required under Wyoming v. Oklahoma, 60 U.S.L.W. at 4124. In any case, the County's suggestion seems to be merely a post hac rationalization since, as the County acknowledges, 81% of all landfills in the United States are already owned by states or local units of government. County Brief at 24, citing 53 Fed. Reg. 33, 318 (1988).

[8] The attempted reservation by a state or one of its subdivisions of a private landfill for the (continued...)

B. Acceptance of Michigan's Proposed Extension of the Market Participant Doctrine Would Necessarily Exempt Numerous Private State Regulated Industries from the Strictures of the Commerce Clause.

Apparently recognizing that the Court may conclude that the Waste Importation Restrictions impermissibly discriminate against interstate commerce, Michigan argues in the alternative that the Michigan Solid Waste Management Act is not subject to the strictures of the Commerce Clause since Michigan is acting as a market participant:

> The comprehensiveness of the Michigan regulatory framework permits the conclusion that in the context of landfills, Michigan's laws are "a form of

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[8](...continued)
exclusive use of its own citizens is also tantamount to expropriation by regulation. See Lucas v. South Carolina Coastal Council, 404 S.E.2d 895 (S.C. 1991) (dissenting opinion), cert. granted and argued, 112 S. Ct. 436 (Case No. 91-453) (November 18, 1991).

> state participation in the free market," New Energy Co., 486 U.S. at 277. The comprehensive Michigan laws demand and enable the creation of the product being marketed -- the landfill space. Under these circumstances, Michigan is acting as a market participant and not a market regulator, and therefore the challenged statutes do not violate the Commerce Clause.

State Brief at 102.

Petitioner does not dispute the right of Michigan to grant a preferential right of access to state or county-owned landfills. See Petitioner's Brief at 48-49. Indeed, Petitioner agrees with Michigan that its prohibition upon the disposal of out-of-state waste at state or county-owned landfills is undertaken by the State or its counties as a "market participant," at least where the State or its counties have constructed or otherwise acquired these landfills with

state or county monies. See Swin Resource Systems, Inc. v. Lycoming Co., 883 F.2d 245, 251-254, (3rd Cir. 1989), cert. den. 493 U.S. 1077 (1990).

However, it is absurd for the State to suggest that it is acting as a market participant with respect to Petitioner's privately-owned and operated landfill. In the first place, the Market Participant Doctrine only applies to governmentally-owned or governmentally-financed facilities or activities. See White v. Massachusetts Council of Construction Employers, Inc., 460 U.S. 204 (1983) (city-financed construction projects); Reeves, Inc. v. Stake, 447 U.S. 429 (1980) (state-owned cement plant); Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976) (state "bounties" for abandoned automobiles). Moreover, if the

Market Participant Doctrine were extended, as Respondents now urge, to all private facilities which are subject to extensive state regulation, it would necessarily follow that such Doctrine would then apply to banks, insurance companies, public utilities, milk processing facilities and numerous other privately-owned facilities which, like privately-owned landfills, are subject to extensive state regulation. Any such extension of the Market Participant Doctrine would be hopelessly inconsistent with numerous of this Court's decisions, including Wyoming v. Oklahoma, 60 U.S.L.W. 4119 (1992) (state regulated, privately-owned, electric utility), New England Power Co. v. New Hampshire, 455 U.S. 331 (1982) (state regulated, privately-owned, electric facility) and

Lewis v. BT Investment Managers, Inc., 447 U.S. 27 (1980) (state regulated trust companies and investment advisors), and would provide States with a simple means for evading the strictures of the Commerce Clause. Cf. United Building & Construction Trades Council of Camden County and Vicinity v. Mayor of Camden, 465 U.S. 208, 217 n.9 (1984).

C. St. Clair County's Proposed Extension of National League of Cities and Its Alternative Call for the Overturning of City of Philadelphia Because It Is Burdensome Would Likewise Emasculate the Commerce Clause.

Finally, Respondent St. Clair County contends that the Court should craft a new exception to the strictures of the Commerce Clause or, in the alternative, should overturn City of Philadelphia v. New Jersey.

In particular, Respondent St. Clair

County contends that City of Philadelphia v. New Jersey should not be applied so as to constrain discrimination against interstate commerce in the case of solid waste because (i) the regulation of solid waste is an important fundamental function of state and local governments of the type which would have been immune from Congressional regulation under the Commerce Clause under National League of Cities v. Usery, 426 U.S. 833 (1976), but for the fact that National League of Cities was overruled by Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985), rehearing denied, 471 U.S. 1049 (1985),[9] (ii) under Garcia

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[9] The Kentucky Brief makes a similar argument, albeit without benefit of supporting citations: "[W]hen a community allows a landfill to be sited and operate within its boundaries, it may insist that as a condition of existence the facility address only local needs." Kentucky Brief at 13.

"[t]he nature and extent of regulation of our nation's market place should properly be decided by Congress, not the Courts, in the exercise of its commerce power," and (iii) "[s]ince Congress has not acted to restrict state's rights in respect to regulation of solid waste, the Courts should not become involved." County Brief at 35-36. Aside from the fact that National League of Cities was overruled by Garcia and the further fact that nothing in Garcia supports the County's suggestion that the Court "should not become involved" in determining whether a State's regulation of solid waste violates the negative aspects of the Commerce Clause, the County's argument fails because its premise is fatally flawed: National League of Cities only held that the Congress could not, under

the Commerce Clause, compel the States or its subdivisions to employ their own employees on the terms and conditions which were set forth in the Fair Labor Standards Act. Nothing in National League of Cities even remotely suggests that a State's determination to prohibit the importation of articles of commerce originating out of state for use or disposal at a privately-manufactured and operated facility, including a landfill, is immune from Congressional regulation under the Commerce Clause. Such a determination would hardly seem to be a regulation of a state as a state, or to be a matter that is an indisputable attribute of state sovereignty, as would have been necessary under Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 287-288 (1981), in

order to make such a determination exempt from Congressional control under the Commerce Clause, even if National League of Cities had not been overruled. Indeed, in Hodel this Court held that Virginia's power to regulate land use by private mining companies was subject to Congressional control under the Commerce Clause:

> "[T]o object to this scheme, however, appellees must assume that the Tenth Amendment limits congressional power to pre-empt or displace state regulation of private activities affecting interstate commerce. This assumption is incorrect."

452 U.S. at 289-290. Thus, even if one were to make the dubious assumption, which St. Clair County suggests, that the collection of municipal solid waste by private carters is a traditional governmental function which might be exempt from Congressional control under

the Commerce Clause under National League of Cities,[10] see County Brief at 35-36, it would not follow that the granting of

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[10] See National League of Cities, 426 U.S. at 856 (Blackmun, J., concurring)("[I]t seems to me that [the Court's majority opinion] adopts a balancing approach, and does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential."). In Hybud Equipment Corp. v. City of Akron, 654 F.2d 1187 (1981), remanded on other grounds, 455 U.S. 931 (1982), the Court of Appeals held that a city ordinance requiring all solid waste generated within the city to be delivered to a municipal co-generation recycling facility was exempt from the constraints of the Sherman Act under National League of Cities. 654 F.2d at 1195-1196. Interestingly, however, without even suggesting that National League of Cities would exempt the ordinance from the constraints of the Commerce Clause, the court separately determined that the ordinance was "not special interest legislation that discriminate[d] against out-of-town people who vote elsewhere in favor of local residents and local voters," and did not otherwise discriminate against interstate commerce in violation of the Commerce Clause. 654 F.2d at 1194-1195. Thus, while Hybud may suggest that a State can exercise absolute control over the flow of all in-state waste without violating the Commerce Clause, it does not follow, as the Kentucky Brief at 52 suggests, that it can do so in a manner which discriminates against out-of-state waste. 654 F.2d at 1194-1195.

a permit or license to a privately-owned company to construct or operate a landfill was a "[function] essential to separate and independent existence" of the state, National League of Cities, 426 U.S. at 845 (quoting Coyle v. Oklahoma, 221 U.S. 559, 580 (1911)), which would be immune from such Congressional control. It would be even more absurd to suggest that the immunity suggested by the County extended beyond the power to grant the permit or license so as to permit the state to condition the right to use the facility to those who lived within the state, for if the immunity were so broad, then the exercise of the traditional state power over banking could be used to exclude foreigners from borrowing money from or owning the stock of banks, and, in like manner, the exercise of the

traditional governmental power to inspect meat or milk could be used as the vehicle for excluding meat or milk originating outside the state.[11]

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[11] The Pennsylvania Brief makes its own novel suggestion that the Michigan Solid Waste Management Act is immune from review under the Commerce Clause because the Resource Conservation and Recovery Act "must have intended to permit" a state solid waste management plan which "the Commerce Clause [might] otherwise forbid." Pennsylvania Brief at 4. The short answer to the suggestion is that a congressional intent to authorize an otherwise impermissible discrimination against interstate commerce must be "expressly stated" and "unmistakably clear," South-Central Timber Development, Inc. v. Wunnicke, 467 U.S. 82, 91 (1984). Furthermore, if Congress intended that RCRA should permit a state to exclude out-of-state waste, notwithstanding City of Philadelphia v. New Jersey, it has had thirteen years to say so. Moreover, as discussed more fully in the Brief of the Environmental Transportation Association, as Amicus Curiae, in Support of Petitioner's Petition for Writ of Certiorari, at 7-8, officials of the Federal Environmental Protection Agency have condemned efforts by state and local governments to interfere with the interstate movement of waste and, even as acknowledged in the State Brief at 17, have recognized the necessity for the continuance of a national market.

Alternatively, the County suggests that the Court should consider overturning City of Philadelphia v. New Jersey insofar as it relates to solid waste: "The holding of Philadelphia when there is an express economic protectionist measure has relevance in other areas of the law, but it is not performing a valid function in respect of solid waste." County Brief at 38. In support of this conclusion, the County contends that City of Philadelphia "has made it difficult for most states to cope with providing for their own needs, much less having their available landfill capacity used up by the indiscriminate interstate solid waste stream." County Brief at 34 (footnote omitted).[12]

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[12] The Kentucky Brief also suggests that City of Philadelphia should be overturned because it (continued...)

Obviously, this Court cannot disregard the strictures of the Commerce Clause merely because they are burdensome. As

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[12](...continued)
has been too broadly applied, because it has been criticized, and because the majority's analysis "begged the question," "went astray", was "not correct" and made an "unthinking analogy." See Kentucky Brief at 35, 36, 39 and 50. In like manner, the Pennsylvania Brief makes an ipse dixit argument that City of Philadelphia should be overruled and further contends that the Michigan Solid Waste Management Act should not be governed by the strict scrutiny test which is applicable to discriminatory legislation or even by the balancing test which is applicable to nondiscriminatory legislation under Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). See Pennsylvania Brief at 9-17. Instead, the Pennsylvania Brief suggests that the Michigan Solid Waste Management Act should be upheld, notwithstanding its discriminatory effect, unless it is shown by Petitioner that it puts a "substantial and needless burden" on interstate commerce. Pennsylvania Brief at 17. While the Pennsylvania Brief cites Maine v. Taylor as support for its novel suggestion, Maine v. Taylor in fact undermines its argument since Maine v. Taylor clearly requires that once a state law is shown to discriminate against interstate commerce, either on its face or in effect, the "burden falls on the State to demonstrate both that the statute 'serves a legitimate purpose,' and that this purpose could not be served as well by available nondiscriminatory means." 477 U.S. at 138 (citing Hughes v. Oklahoma, 441 U.S. at 336).

this Court wrote long ago in West v. Kansas Natural Gas Co., 221 U.S. 229 (1911) in response to Oklahoma's efforts to preserve its natural gas for its own citizens:

> [W]e have said that "in matters of foreign and interstate commerce there are no State lines." In such commerce, instead of the States, a new power appears and a new welfare, a welfare which transcends that of any State. But rather let us say it is constituted of the welfare of all of the States and that of each State is made the greater by a division of its resources, natural and created, with every other State, and those of every other State with it. This was the purpose, as it is the result, of the interstate commerce clause of the Constitution of the United States. If there is to be a turning backward it must be done by the authority of another instrumentality than a court."

221 U.S. at 255.

CONCLUSION

For the reasons set forth herein and in Petitioner's brief on the merits, this Court should reverse the judgment of the Court of Appeals for the Sixth Circuit and declare the Waste Importation Restrictions to be unconstitutional under the Commerce Clause.

Dated: March 18, 1992

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